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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 BLINK HEALTH LTD.,

4 Plaintiff,

5 v.

18 CV 2258 (PKC)

6 HIPPO TECHNOLOGIES LLC,

7 Defendant.

8 -----x

9 New York, N.Y.  
May 14, 2018  
11:45 a.m.

10 Before:

11 HON. P. KEVIN CASTEL,

12 District Judge

13 APPEARANCES

14 GIBSON, DUNN & CRUTCHER, LLP

15 Attorneys for Plaintiff Blink

16 BY: ORIN SNYDER

ANGELIQUE KAOUNIS

17 BABAK GHAFARZADE

18 PROSKAUER ROSE, LLP

Attorneys for Defendant Hippo

19 BY: STEVEN M. KAYMAN

STEVEN B. FEIGENBAUM

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1 THE COURT: Please be seated.

2 (Case called)

3 MR. SNYDER: Good morning, your Honor, Orin Snyder,  
4 for the plaintiff.

5 THE COURT: All right. Good morning, Mr. Snyder.

6 MS.KAOUNIS: Good morning, your Honor.

7 Angelique Kaounis, for plaintiff.

8 THE COURT: Thank you.

9 MR. GHAFARZADE: Good morning, your Honor.

10 Babak Ghafarzade, for the plaintiff.

11 THE COURT: Let me see if I can get your name  
12 correctly. Say it again if you will.

13 MR. GHAFARZADE: Babak Ghafarzade.

14 THE COURT: I'm sorry. I didn't have it on the docket  
15 sheet.

16 MR. GHAFARZADE: I filed a notice of appearance this  
17 morning.

18 THE COURT: OK. "Ghafarzade". Say it again.

19 MR. GHAFARZADE: "Ghafarzade".

20 THE COURT: "Ghafarzade". Thank you.

21 For the defendant?

22 MR. KAYMAN: Steven Kayman, Proskauer.

23 THE COURT: All right.

24 MR. FEIGENBAUM: Steven Feigenbaum, Levi Lubarsky  
25 Feigenbaum & Weiss.

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1 THE COURT: All right. Thank you all for coming in.

2 Let me ask Mr. Kayman with regard to Hippo  
3 Technologies LLC, who are the members of the LLC?

4 MR. KAYMAN: I'm not certain, your Honor. I believe  
5 that they are trusts that are beneficially owned or controlled  
6 by the two founders of Hippo Technologies, Mr. Jacobi and  
7 Mr. Kakaulin.

8 THE COURT: All right. And when did Hippo, the LLC  
9 come into existence?

10 MR. KAYMAN: Again, I'm not exactly certain, your  
11 Honor, but I believe it was in the early part of 2017.  
12 Perhaps, February but I can't be sure of that. We can  
13 certainly get that information for your Honor.

14 THE COURT: All right. And what does it mean to be an  
15 LLC? This is an LLC formed under the law of what jurisdiction?

16 MR. KAYMAN: Delaware, your Honor.

17 THE COURT: All right. What does it mean to be an  
18 LLC? I know what a corporation is. I know what partnership  
19 is. I know an LLC is not a corporation. It's a membership  
20 entity. What does that mean?

21 MR. KAYMAN: It's a limited liability corporation,  
22 your Honor.

23 THE COURT: You'd better check on that. Are you sure  
24 it's a limited liability corporation or a limited liability  
25 company?

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1 MR. KAYMAN: You're right, your Honor. Limited  
2 liability company.

3 THE COURT: There's a big distinction. So for can  
4 diversity jurisdiction purposes, for example, if it's a  
5 corporation we look to the principle place of business and its  
6 state of organization. We don't do that for an LLC.

7 MR. KAYMAN: Same as partnership, absolutely.

8 THE COURT: Exactly. So is it the same as a  
9 partnership in other respects? That's what I am trying to get  
10 to the bottom of.

11 MR. KAYMAN: I think it's a hybrid is my understand, a  
12 high level, your Honor. I'm not a corporate lawyer but I think  
13 that most people who are somewhat but not heavily versed in  
14 these matters would view it as a sort of hybrid between a  
15 partnership and a corporation.

16 THE COURT: OK. All right. Thank you.

17 Let me hear from the movant and then I'll hear back  
18 from you in response if that works for you.

19 MR. KAYMAN: I think I'm the movant.

20 THE COURT: Oh, you are the movant, so go ahead.

21 MR. KAYMAN: This is on the motion to compel  
22 arbitration, your Honor.

23 THE COURT: Yes.

24 MR. KAYMAN: Thank you very much, your Honor.

25 I'll be very brief because I think our papers have set

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1 out the gist of our position. I know your Honor has looked at  
2 them. I was in front of you back in October for another motion  
3 to compel arbitration.

4 There are four points that I think dictate the result  
5 here and they dictate the result even if the other side, Blink,  
6 is right in all of its legal arguments. Those four points  
7 are -- and I don't think they're right in all their legal  
8 arguments, let me be clear -- number one, there is no dispute  
9 that Blink is required to arbitrate the claims asserted by the  
10 founders of Hippo, Mr. Jacobi and Mr. Kakaulin. So the  
11 arbitration is going forward.

12 Number two, there is no doubt that the issues in the  
13 arbitration substantially -- and I would say very  
14 substantially -- overlap with the issues in this lawsuit.

15 Number three, there is every reason to believe that  
16 the outcome of the arbitration will determine through res  
17 judicata most and probably all of the issues in this case.

18 Therefore, and number four, it's basic law that when  
19 there's overlap between an arbitration and a lawsuit the  
20 arbitration should go first to avoid inconsistent results, the  
21 risk of inconsistent results, to increase efficiency and to  
22 validate the parties' agreement to arbitrate.

23 THE COURT: Let me ask you the specific relief that  
24 you seek on your motion.

25 MR. KAYMAN: To stay this case pending the

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1 arbitration.

2 THE COURT: OK.

3 MR. KAYMAN: We don't think that under the FAA  
4 dismissal is appropriate. I think that at the end of the day  
5 this case is likely to get dismissed after the arbitration but  
6 as we read the law, the Court is if not required, strongly  
7 mandated to stay it rather than dismiss it. If your Honor  
8 agrees with us that the arbitration should go first as I hope  
9 your Honor will, so that is the relief we seek to stay this  
10 case pending the arbitration.

11 THE COURT: What is the status of the arbitration?

12 MR. KAYMAN: The quick update, your Honor, is that we  
13 now have an arbitrator, Honorable Carol Heckman, a former  
14 federal magistrate judge from Buffalo who was appointed just  
15 last week as the arbitrator. And both sides have, we of  
16 course, submitted a statement of claims and Blink has put in  
17 opposition answer reservation of rights challenge to the way in  
18 which the proceeding is being held based on employment versus  
19 commercial rules and some other technical issues, but they do  
20 not can challenge the arbitration going forward.

21 THE COURT: Now, let me ask you, what relief do you  
22 seek in the arbitration?

23 MR. KAYMAN: A variety of different forms of relief,  
24 your Honor. But most pertinent to the issue before the Court  
25 today we seek a declaration that A, there are no trade secrets

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1 that Blink possesses that are B, in use by Hippo or the two  
2 principles of Hippo. So we seek a declaration that there has  
3 been no trade secret misappropriation which obviously is the  
4 heart of this case.

5 THE COURT: OK. Let me hear from the non movants.

6 MR. SNYDER: Yes. Thank you, your Honor.

7 and I appreciate the earlier questions through  
8 Mr. Kayman because I think they're both dispositive of the  
9 motion here.

10 Of course arbitration is favored in federal court and  
11 is a strong and local policy favoring it but only when the  
12 plaintiff here has agreed to arbitrate and of course, we agreed  
13 to arbitrate limited issues limited in time against two of the  
14 many individuals who conspired to steal our trade secrets.

15 THE COURT: What do you mean by "limited in time"?

16 MR. SNYDER: Well, the two wrongdoers or alleged  
17 wrongdoers who were implicated in our complaint but non named  
18 as defendants signed settlement agreements with Blink that only  
19 protected them or only governed their conduct through for one  
20 of them January of 2017 and the other, February 2017. The acts  
21 alleged in the complaint by my client, Blink, commenced and  
22 embraced alleged wrongdoing later in 2017. For example --

23 THE COURT: They commenced later in 2017; is that what  
24 you say?

25 MR. SNYDER: Well, we don't know and we'll only know

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1 through discovery when they actually formed a company but we  
2 know that two months after each signed settlement agreements  
3 with us, they filed applications with the U.S. Patent and  
4 Trademark Office to trademark the name "Hippo" and they  
5 described it in way that was suggestive of theft. And then in  
6 the months --

7 THE COURT: They did it when?

8 MR. SNYDER: Yes, sir. In April of 2017, April 19.  
9 And then we go on to explain that the defendant company acting  
10 through its many officers and agents --

11 THE COURT: Just back up. You're saying after  
12 February 2017 Jacobi and Kakaulin had no obligations to you  
13 under the NDA.

14 Is that what you are saying?

15 MR. SNYDER: No. What I'm saying is that they're not,  
16 that the agreement only involved released conduct before those  
17 dates. They didn't got a free pass and immunity after those  
18 dates and therefore, we would contend that any wrongdoing  
19 thereafter -- for example, if they burned down our building  
20 and/or committed an assault and battery we would be able to sue  
21 them in a court. We would not have to arbitrate those post  
22 release acts.

23 And in fact one of the major allegations in the  
24 complaints occurs in February of 2018, more than a year after  
25 Jacobi or Kakaulin signed their release documents where they



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1 sought our marketing playbook which is our crown jewel  
2 documents. So this is, your Honor, a trade secret theft  
3 lawsuit against the corporation, Hippo, with respect to which  
4 we never entered into any agreement much less agreed to  
5 arbitrate

6 THE COURT: I'm going to let you each sum up any which  
7 way you want but I am trying to understand. So some things  
8 you'll just have to bear with me on. And feel free,  
9 Ms. Kaounis is welcomed to respond directly to any inquiry.  
10 There is no rule.

11 Are you member of the bar of this court?

12 MS. KAOUNIS: I have been admitted pro hac vice.

13 THE COURT: Wonderful. So you are permitted to  
14 respond as well.

15 What I'm trying to understand was your reference to  
16 the timeframe and these claims being outside of the timeframe  
17 governed by the nondisclosure agreement.

18 MR. SNYDER: I can explain that directly. So the  
19 parties had various disputes. They settled those disputes,  
20 entered into written settlement agreement. That settlement  
21 agreement contained an arbitration agreement. The disputes  
22 that were settled involved conduct that predated both January  
23 31, '17 with the Kakaulin and February 5, '17 for Jacobi,  
24 meaning to say we only agreed to arbitrate to the extent that  
25 they were in violation of their ongoing obligations under the

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1 settlement agreement. We did not immunize them or agreed to  
2 arbitrate in the event they committed torts in the future in  
3 conspiracy with others and on behalf of a corporation.

4 THE COURT: Where was the nondisclosure provision  
5 contained?

6 MR. SNYDER: The NDAs are stand-alone agreements and  
7 continue to obligate them not to use our trade secret.

8 THE COURT: When were entered into?

9 MS.KAOUNIS: During the employment.

10 MR. SNYDER: 2016 or so.

11 THE COURT: And then there is a settlement agreement  
12 that is entered into when?

13 MR. SNYDER: With respect to Mr. Jacobi who is in the  
14 courtroom February 5, 2017 with Mr. Kakaulin January 31, 2017.  
15 And then we allege in our complaint of course a conspiracy that  
16 goes way outside those dates and continues to the present and  
17 frankly gains its steam or momentum in 2017 or early '18 and  
18 includes today and includes many others who has no agreements  
19 with us, much less agreements to arbitrate.

20 THE COURT: One moment.

21 All right. So here is the presenting question.  
22 There's a settlement agreement and mutual release. I'm looking  
23 at the Kakaulin one. I know that the Jacobi one has different  
24 language in it. I have that also in front of me. And what I'm  
25 looking at are Exhibits C and D to the Fiegenbaum declaration.

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1 MR. SNYDER: Yes, your Honor.

2 THE COURT: And what I see here is a document that  
3 doesn't tell me what the terms of the agreement are, but then  
4 I'm being asked to decide -- and this may be part of your  
5 position as the non movant -- but I'm being asked to decide  
6 whether the present dispute arises out of or relates to the  
7 agreement. That's the language in I think Jacobi and in the  
8 second one. Maybe I have them flipped. Jacobi says:

9 "Any dispute regarding this agreement"

10 And Kakaulin says:

11 "Any dispute or controversy arising out of or relating  
12 to this agreement."

13 And you say that has nothing to do with an NDA. It  
14 has to do with the scope of a release. Is that what you are  
15 representing to me, that the only thing that is covered within  
16 these two settlement agreements are the terms of the release?

17 MR. SNYDER: No, your Honor.

18 THE COURT: And what claims are extinguished and what  
19 consideration is being paid to anybody who is being released?

20 MR. SNYDER: No, your Honor.

21 THE COURT: Then what is the agreement -- let me not  
22 yell at you. Let me yell at -- when I say "yell", I mean that  
23 colloquially.

24 Mr. Kayman, how am I supposed to decide whether this  
25 dispute relates to the agreement if I don't know what the

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1 agreement says?

2 MR. KAYMAN: I apologize if we aren't clear, your  
3 Honor. Both agreements expressly incorporate the underlying  
4 NDA.

5 THE COURT: Where? Because I have the agreements in  
6 front of me. Tell me which paragraph I should look at.

7 MR. KAYMAN: If your Honor looks at Jacobi settlement  
8 agreement, page three, paragraph 5A.

9 THE COURT: Hang on a second because what I have looks  
10 like this, a blank page.

11 MR. FEIGENBAUM: Your Honor, I have with me  
12 un-redacted version of both agreements, if your Honor would  
13 like to see them.

14 THE COURT: Here is the question. Were un-redacted  
15 versions filed?

16 MR. KAYMAN: No, your Honor, because there are  
17 confidentiality provisions in the settlement agreement, so we  
18 only filed redacted versions. We filed those sections that  
19 pertain to the arbitration provisions. We didn't file one  
20 pertaining to the NDAs.

21 MR. FEIGENBAUM: No. The only thing that was filed  
22 publicly was arbitration provisions. Frankly, your Honor, we  
23 didn't think there would be a dispute.

24 THE COURT: Well, when you say the only thing that was  
25 filed publicly what was filed not publicly, did you submit an

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1 order to the Court asking to seal something?

2 MR. FEIGENBAUM: We did not.

3 THE COURT: So when you say the only thing that was  
4 filed publicly, the only thing that was filed anywhere given to  
5 the Court in any way, shape or form was the redacted version.

6 MR. FEIGENBAUM: Was the arbitration version.

7 THE COURT: No. No. The redacted version of the  
8 agreement.

9 MR. KAYMAN: The redacted version.

10 THE COURT: Excuse me. Excuse me. Is that a "yes" or  
11 is that a "no"?

12 MR. FEIGENBAUM: No. That's correct.

13 THE COURT: Thank you.

14 MR. KAYMAN: I was just going to add, your Honor, we  
15 did quote the relevant provisions of the settlement agreement  
16 including the incorporation of the NDA in our brief and perhaps  
17 we should have submitted these in camera or made a motion for  
18 sealing. We didn't frankly expect on argument.

19 THE COURT: You are shocked that somebody's opposing  
20 your motion. I got it.

21 MR. KAYMAN: We knew they were going to oppose the  
22 motion but we were trying to comply with the niceties and if we  
23 got it wrong, we apologize.

24 THE COURT: It's not a question of getting it wrong.  
25 It's a question of you're trying to persuade a judge that this

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1 falls within the four corners of an agreement that says any  
2 dispute regarded, related or concerning --

3 MR. KAYMAN: Correct.

4 THE COURT: -- the settlement and release.

5 MR. KAYMAN: Correct.

6 THE COURT: And why I could certainly understand if it  
7 was some provision in there that was top secret and nobody  
8 wanted the Court to know about it, that might be one thing. We  
9 might have a little discussion about that today, but it at  
10 least I would have some way of knowing whether the dispute is  
11 within the scope of the settlement agreement and release. I  
12 literally have no way of knowing.

13 MR. KAYMAN: We apologize, your Honor.

14 May we hand up the two un-redacted agreements?

15 THE COURT: I think it's a really good idea and then  
16 maybe I'll have some idea of what everybody's talking about.

17 MR. KAYMAN: I think I could guide the Court.

18 THE COURT: Have you shown it to opposing counsel  
19 before you show it to me?

20 MR. KAYMAN: Of course.

21 (Pause)

22 THE COURT: OK. I'm going to have marked as Exhibit A  
23 is the Jacobi, Court Exhibit B the Kakaulin.

24 (Pause)

25 THE COURT: So what provision -- start with Jacobi --

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1 do you contend is at issue in the arbitration?

2 MR. KAYMAN: Yes, your Honor. Page three paragraph 5A  
3 headed confidentiality and intellectual property assignment.

4 THE COURT: Hang on a second. Page three, 5A. Thank  
5 you.

6 MR. KAYMAN: Yes, your Honor.

7 THE COURT: Go ahead.

8 MR. KAYMAN: It says employee reaffirms and  
9 acknowledges that he remains bound by the provisions of that  
10 certain confidentiality assignment of the mentioned non  
11 competition and non-solicitation agreement executed by employee  
12 in the company on July 31, 2015, the NDA. And we also --

13 THE COURT: An employee further affirms and  
14 acknowledges that the provisions of the NDA shall remain  
15 binding upon him except that the scope of the non competition  
16 clause in the NDA is modified only to prohibit employees from  
17 and then it describes certain things.

18 MR. KAYMAN: And to call an agreement, if your Honor  
19 would be so kind as to turn to page seven and specifically, to  
20 paragraph 13 which is headed "prior agreements", it states:

21 "Except as may be otherwise modified in this agreement  
22 the call-in agrees that he shall remain bound in all respects  
23 by of the allegations set forth in paragraph one which is  
24 headed "confidentiality" and paragraph four and five non  
25 solicitation of customers and non solicitation of employees of

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1 the confidentiality assignment -- solicitation agreement signed  
2 by Kakaulin on August 11, 2015.

3 THE COURT: All right. The lead-in is except as may  
4 be otherwise modified in this agreement which may or may not  
5 have some significance here. So tell me why this dispute falls  
6 within the terms of the settlement agreement and mutual  
7 release.

8 MR. KAYMAN: Absolutely, your Honor. So I think it is  
9 best like so many things done through an illustration. A  
10 picture is worth a thousand words and all that. In the state  
11 court case Blink sued the individuals, Jacobi and Kakaulin and  
12 also Hippo and asserted essentially the same claims being  
13 asserted here that the company was a sham, that it's a copycat,  
14 that it's founded on theft of Blink's trade secrets, et set.

15 In this case after getting escorted out shall we say  
16 of state court, they tried to be a little more clever. They  
17 just dropped the individuals. But the claims are fundamentally  
18 the same. They are essentially, that Blink came up with all  
19 these wonderful ideas which are supposedly secret that the  
20 individuals from working at Blink learned the secret sauce and  
21 have now taken the secret sauce and used it to create Hippo.  
22 And all they do is they blame Hippo instead of the few  
23 individuals to the extent they can and they bring in some lower  
24 level people and try to make them responsible.

25 It's as Justice Sherwood said. It's an attempt to



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1 plead around the arbitration obligations. When those  
2 obligations to arbitrate are broad, obvious and directly  
3 implicated by the core of the complaint in this case, which is  
4 that Hippo through individuals, these two, Mr. Jacobi is right  
5 there and Mr. Kakaulin and some lower level people, one of whom  
6 didn't even work for Hippo supposedly stole Blink's trade  
7 secrets.

8 THE COURT: But a key link in your argument is that  
9 these two agreements, the separation or settlement agreement  
10 shall be construed as incorporating an arbitration mechanism  
11 for any future dispute over the NDA. That's your position?

12 MR. KAYMAN: That's fair. And I think that might be  
13 right, your Honor, it says thou shalt now use Blink's  
14 confidential information in so many words.

15 THE COURT: Well, no. Let's be accurate and let's be  
16 fair. I suspect the NDA may say that but these agreements  
17 reaffirm that the NDAs remain binding. They don't have within  
18 them in an independent confidentiality requirement. They  
19 reaffirm that the agreements are binding.

20 MR. KAYMAN: I agree with what you just said, your  
21 Honor. Although, they do contain return document provisions,  
22 they've touched on confidentiality, but you're right. The  
23 confidentiality obligation itself --

24 THE COURT: But you are not standing before me and  
25 saying the return of document issue is what the arbitration is

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1 about and that didn't exist in the NDA. It only exists in this  
2 group. That's not your argument.

3 MR. KAYMAN: No. That's correct, your Honor. And we  
4 would have the NDAs if your Honor wants to see them. They are  
5 saying exactly what you would expect them to say.

6 THE COURT: I should have them.

7 MR. FEIGENBAUM: Your Honor, they were introduced in  
8 plaintiff's opposition.

9 THE COURT: They are in the record?

10 MR. FEIGENBAUM: Yes. But if your Honor would like --

11 THE COURT: If they're on the record on the motion,  
12 that's the only question I have had.

13 Let me here from Blink's counsel.

14 MR. SNYDER: Yes, your Honor.

15 This is not a dispute that arises under the NDA or the  
16 settlement agreement. This is obviously a dispute about trade  
17 secrets that we say are protected by federal law and we're in  
18 fact alleging a broader conspiracy that involves acquiring  
19 trade secrets from other individuals, not these two individuals  
20 who were attempting to misappropriate trade secrets that are  
21 not connected in any way to these two individuals. We're  
22 alleging a broad conspiracy that involves a period with our  
23 economic relationships having nothing to with these two  
24 individuals.

25 And of course as your Honor noted, the complaint

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1 focuses on actions that took place largely after these two  
2 agreements were signed. For instance, a orchestrating meetings  
3 between a current Blink employee and a third party to steal our  
4 marketing playbook in 2018.

5 So we're not seeking to hold these two individuals  
6 accountable --

7 THE COURT: They are not a party, correct?

8 MR. SNYDER: Correct.

9 THE COURT: I got that message. I knew that before  
10 you showed up this morning.

11 MR. SNYDER: I'm being repetitive. I'm beating a dead  
12 hoarse.

13 THE COURT: It's not a question of being repetitive.  
14 I understand the procedural history of how you all wound up in  
15 my courtroom here. I got that. You sued them initially and in  
16 this lawsuit you dropped them.

17 MR. SNYDER: Yes, your Honor. What we're saying is as  
18 a matter of contract law and the jurisprudence around  
19 arguability of these kinds of disputes, we never contemplated  
20 nor do the parties intend but agreed to arbitrate against these  
21 two individuals for matters that with respect to Jacobi regard  
22 the agreement and with regard to the other one arise out of or  
23 relate to that that would mean that we have a perpetual  
24 obligation to arbitrate against a company that is later formed  
25 and conspired with a whole range of different individuals,

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1 including these two, to try to destroy our company.

2 That is not what this agreement says. That is not  
3 what the law says. It says that when you want to hold a --  
4 when you want to force an arbitration provision against a third  
5 party it's only limited circumstances if the Second Circuit  
6 says that's OK and either of those circumstances applies here

7 THE COURT: I understand that and if that becomes  
8 necessary we can talk about it. But if I heard correctly this  
9 morning, I heard that Hippo doesn't claim here and now that  
10 there's any obligation on the part of Blink to arbitrate with  
11 them.

12 I heard this morning something very different, that  
13 the relief they're seeking does not include an application to  
14 compel Blink to arbitrate with anyone.

15 MR. SNYDER: Yes, your Honor. It seems they're  
16 seeking to stay, not dismiss. That's correct.

17 THE COURT: So you stood before me moments ago -- we  
18 have a transcript -- and I think you were arguing to me that  
19 when your client signed the agreement they never imagined that  
20 they were agreeing to a perpetual agreement to arbitrate with  
21 an entity that had never been formed. And then you proceeded  
22 to launch into a discussion of Second Circuit case law on  
23 arbitration with non-signatories. But that's not what this  
24 motion is about.

25 MR. SNYDER: As to the stay, your Honor, I also think

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1 that we are entitled to our day in court today, not some future  
2 date.

3 THE COURT: OK. That's a different story. That's a  
4 different story. But this motion as I've come to understand is  
5 not whether under the Contech case and other cases there is  
6 equitable estoppel or sufficient relationship to hold a  
7 non-signatory to an arbitration agreement. That's not been  
8 before me on this application, correct?

9 MR. SNYDER: That seems to be the case.

10 THE COURT: So let's talk about this.

11 MR. KAYMAN: I think Mr. Kayman has it backward. In  
12 terms of res judicata I believe that resolution of the  
13 arbitration is going to resolve the material issues in this  
14 case which is whether the federal statutes governing trade  
15 secret misappropriation were breached or not. They may be  
16 seeking a declaration that the individuals didn't violate the  
17 law but I don't think that is going to be dispositive of all  
18 the material issues in this case because the issues in this  
19 case extend way beyond the conduct of these two individuals.  
20 And the arbitration --

21 THE COURT: Wait a minute. You have to think for a  
22 minute about where a judge stands in a matter like this.

23 Look at me for a minute instead of reading.

24 MR. SNYDER: Yes, your Honor.

25 THE COURT: You want to read?

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1 MR. SNYDER: No, your Honor.

2 THE COURT: We'll give you a recess. Read your paper.  
3 We'll be back in five minutes.

4 MR. SNYDER: Your Honor, I apologize.

5 THE COURT: That's all right. That's good. Just read  
6 your papers. I'll be back in five minutes.

7 (Recess)

8 THE COURT: All right. You may continue, sir.

9 MR. SNYDER: Yes, your Honor. Thank you.

10 And I apologize for not looking at your Honor while  
11 you were speaking.

12 Your Honor, if you look at the arbitration demand and  
13 compare it to the complaint, they're very fundamentally  
14 different pleadings. The complaint is much broader. It  
15 implicates conduct that is not at issue in the settlement  
16 agreement. It implicates conduct of three alleged former Blink  
17 insiders not subject to any arbitration agreements Simanoff,  
18 Tanenbaum and Trepanier and they're alleged to have been part  
19 and parcel of and really at the center of this conspiracy.

20 And what you'll see from the arbitration demand is  
21 that they seek a declaration that Hippo didn't violate any  
22 trade secrets but as a preliminary matter we would contend that  
23 the arbitrator cannot consider a declaratory judgment claim  
24 against Hippo because it falls outside the scope of the  
25 settlement agreement which concerned Jacobi and Kakaulin's

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1 employment. But even if it could again, as I said, our lawsuit  
2 implicates conduct that is not at issue in the arbitration, a  
3 result that the arbitration by definition therefore could not  
4 resolve.

5 To the contrary we believe that it would be more  
6 efficient to have this proceeding occur first and stay the  
7 arbitration because all of the issues decided here would be  
8 dispositive of and have estoppel effect in the arbitration.  
9 For example, your Honor, in the arbitration they allege that  
10 our filing of this federal lawsuit constitutes an abusive  
11 process that by filing this federal lawsuit we committed a  
12 wrong. Of course that can't be determined until this lawsuit  
13 proceeds and your Honor or a jury or an appellate court rules  
14 on the sufficiency of that lawsuit which we believe is  
15 substantial.

16 So while your Honor I understand is in a dilemma  
17 because on the one hand you're being confronted by the  
18 defendant that the arbitration is most efficient deficient and  
19 we're contending that this is most efficient, I believe that a  
20 simple comparison the two pleadings would demonstrate that  
21 arbitration and then this lawsuit would actually create  
22 inefficiencies. And Hippo has not shown that the arbitration  
23 will actually dispose of any material action in this lawsuit.

24 And for example, your Honor, if you look at the  
25 complaint, paragraphs 59 to 73 we recount in some detail how

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1 Hippo and others acquired trade secrets from individuals other  
2 than these two, that these are the issues won't being  
3 confronted litigated in the arbitration. There's another point  
4 which is a due process point and a res judicata point.

5 While in some instances a private arbitration can have  
6 res judicata effect, in a federal lawsuit it's not automatic  
7 and it depends on many factors including how much discovery is  
8 allowed in the arbitration. And so even if the arbitrator  
9 would permit a declaratory judgment claim against Hippo which I  
10 think is farfetched, we are not going to have to the kind of  
11 discovery document and deposition discovery that the Federal  
12 Rules of Civil Procedure afford us in this court and so we  
13 would be before your Honor saying whatever the outcome of this  
14 arbitration we need a shot here against Hippo because we have  
15 that right as a matter of federal law under the Federal Trade  
16 Secret Act, this Court's diversity jurisdiction and otherwise  
17 to litigate those claims here.

18 And so in sum, while clearly there is a relationship  
19 between the two proceedings obviously and clearly, there is  
20 overlap of facts, the test is not whether facts overlap. The  
21 test is whether A, a stay here is appropriate and B, whether  
22 under this court's inherent powers the Court should stay these  
23 proceedings.

24 Now, Hippo cites FAA Section Three as a ground for  
25 seeking a stay of this action. And that section is not



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1 applicable because Hippo is not a signatory to the arbitration  
2 agreements. And so second, your Honor, again, the issue here  
3 is not are there issues that overlap. The issue is whether the  
4 issues that will be finally determined by the mediator, by the  
5 arbitrator, whether the issues that will be finally determined  
6 by the arbitrator will be dispositive of the issues here. And  
7 because the complaint in our action attributes misconduct to  
8 Hippo as a corporate entity that has nothing to do with  
9 settlement agreement and individuals who have are signatories  
10 to the settlement agreement, this action will move forward  
11 irrespective of the arbitrator's decision on whatever issue the  
12 arbitrators chooses to decide.

13 So we would respectfully submit that we be entitled to  
14 proceed here and we will be asking the arbitrator to stay her  
15 proceeding to allow this lawsuit to proceed if your Honor  
16 allows it.

17 Now in terms of which case IS more advanced, they're  
18 about the same starting line. We have an arbitrator but we  
19 haven't had any hearings or meetings with the arbitrator. The  
20 parties haven't met and conferred about discovery. I imagine  
21 they are going to resist in an arbitration the kind of robust  
22 discovery that we would want in this lawsuit. And in a trade  
23 suit case there is certain discovery that is essential. I'm  
24 not saying we're going to want to depose the world, we are  
25 going to want to take a number of third party and party

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1 depositions and in my experience arbitrators are generally  
2 hostile to that kind of discovery. We are going to want some  
3 kind forensic examination of electronic equipment. And I just  
4 think that we're going to be hamstrung in an arbitration and  
5 even if we're entitled to some discovery, the issues are going  
6 to not overlap and we're going to be back here litigating this  
7 case in earnest.

8           So we would respectfully submit that the defendant has  
9 not yet its burden to show that a stay is appropriate or in the  
10 interest of justice. This is not one of these cases where  
11 there's complete overlap of claims and each side is raising to  
12 its preferred forum. Again, there is a reference made to  
13 state, federal court arbitration. We want to get to the truth  
14 which means we need as much discovery as is reasonable to  
15 determine who was involved and that's going to require  
16 subpoenas to third parties. We may need to go to other  
17 jurisdictions and get nonparty subpoenas under Rule 45 and  
18 certainly that won't be available to me in arbitration as well.

19           So for all those reasons, your Honor, we respectfully  
20 request that this Court deny the motion to stay and set a  
21 discovery schedule. We're prepared to conduct discovery in a  
22 reasonable amount of time. I think the parties agreed to 120  
23 days and most of the other parameters of the discovery. We're  
24 not looking to drag this out. We just want to get to the facts  
25 and then present them to the Court for resolution and then I

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1 don't think there'll be anything left to arbitrate because the  
2 underlying issues here are dispositive of the abuse of process  
3 claims and of declaratory release claim and the final claims  
4 are --

5 MS.KAOUNIS: They have breaches of the settlement  
6 agreement as well related to --

7 THE COURT: Please stand when you are speaking and  
8 speak so that the court reporter can hear you.

9 MS.KAOUNIS: There are four claims that are going to  
10 be basically resolved by this action. The first is the  
11 declaratory relief claim. The second is the abuse of process  
12 claim. The third is bad faith under the DTA claim because that  
13 has to show that there was no bad faith in filing of the action  
14 and the fourth is the interference claim which is hinged off of  
15 the same conduct. So those four claims will be decided by what  
16 happens in this action and they cannot be decided until this  
17 action is resolved.

18 THE COURT: Thank you.

19 MR. SNYDER: I just wanted to apologize again for any  
20 disrespect the Court interpreted. I was simply scrambling to  
21 read my notes and your question. So I apologize.

22 THE COURT: OK. Thank you.

23 Let me hear from the movant.

24 MR. KAYMAN: They very much, your Honor.

25 Actions speak than words. They don't want to get at

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1 the truth. We offered to jointly retain an expert. Early on  
2 when Paul Weiss was -- he said look, let's hire an expert or  
3 experts. Let them look at what we're using and report to both  
4 of us on whether there's any truth to these accusations. They  
5 flatly turned us down.

6 Again, actions speak louder than words. Paul Weiss  
7 respecting Blink at the time negotiated these settlement  
8 agreements, proposed the arbitration provisions at the  
9 beginning which were adopted virtually unchanged in the final  
10 versions. Those arbitration provisions have not been honored  
11 by Blink. There is no question that they have dishonored those  
12 arbitration provisions, first by bringing state court action  
13 and now by bringing this action. The rules of the AA provide  
14 for arbitration to be confidential, that their call-in  
15 agreement specifically provide in many words for  
16 confidentiality. There is no question they've breached those  
17 obligations, none.

18 So we're hearing a lot of words about how it's really  
19 all the three low level people. It's's really all Hippo. It's  
20 not Jacobi and Kakaulin. That's just not credible. They say  
21 there is not complete overlap but, wow, this is inextricably  
22 interwoven overlap if there ever way any. There is a lot of  
23 those. And the only reason there isn't complete overlap is  
24 because of clever pleading as Judge Sherman said. Let me be  
25 clear we're only asking for a stay and not a ruling on Hippo's

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1 being subject to arbitrability because we think that's for the  
2 arbitrator and we think the law is clear on that.

3 I totally disagree with all respect to my brethren  
4 across the table that everybody wouldn't be bound by whatever  
5 the arbitrator decides. We all know that the ground for  
6 appealing an arbitral ruling are extraordinarily limited. And  
7 allowing less discovery than they might want is not a ground.  
8 It's only exceeding jurisdiction or taking bribes or something  
9 really heinous and I don't know how much discovery they are  
10 going to get.

11 THE COURT: I think counselor's point is not that an  
12 award wouldn't be enforceable but that an award may or may not  
13 provide a grounds for issue preclusion in this action. That's  
14 a different issue than whether or not theres a ground to vacate  
15 the award or ground to enforce the award.

16 MR. KAYMAN: Fair, your Honor. But again, actions  
17 speak louder than word. And if they really wanted to get at  
18 the truth why don't they agree to arbitrate against Hippo and  
19 that way there would be no question about it? If trade secrets  
20 are being used by Hippo, that's what they ought to be concerned  
21 about. And by trying to block a determination as to whether  
22 Hippo is using trade secrets or not, I think that the intent is  
23 obvious. And it's obvious from those 11 subpoenas they served  
24 in the state court action right after commencing it. My client  
25 is a start-up. It's in the process of trying to strike deals

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1 with business partners. Blink's been around for a number of  
2 years. It's got a ton of money. I think the public release  
3 was 160 million and they're trying to put us out of business.  
4 That's what's going on here. And we want an arbitration, not  
5 because we don't relish this process of having just determined  
6 in this court but because it's quicker and cheaper and that's  
7 the critical for us.

8 We've got to get this over so we can move on with our  
9 business. And importantly, your Honor, bring some competition  
10 to this industry which is badly in need of it and lower  
11 prescription drug prices to people who are badly in need of  
12 that, and whether it's this court or an arbitrator, someone we  
13 think is going to determine that the trade secrets are not in  
14 use. I think what we're going to pitch to the arbitrators  
15 right of the bat is instead of each said having their own  
16 experts, we'd like you, your Honor -- she's a former judge --  
17 to commission your own expert and go in and look at what they  
18 claim are trade secrets and have the expert report and whether  
19 they are. Go in and look at what we're doing and tell us  
20 whether we're using any trade secrets. We don't think we are.  
21 But if we are, tell us and we'll stop. We don't want to use  
22 their trade secrets. That can be accomplished in an  
23 arbitration much more efficiently in the real world than in a  
24 court. You heard them. They are going to be seeking subpoenas  
25 on everybody in town. And we don't have the money to fight

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1 that battle.

2 So I think at a practical level and at a doctrinal  
3 level because there is a strong federal policy favoring  
4 arbitration, the right decision is to stay this case and to  
5 find in favor of the arbitration. And I think that from an  
6 equitable standpoint, look at the way they behaved. That cries  
7 out for this Court to stay this case.

8 THE COURT: Thank you.

9 MR. KAYMAN: They've accomplished a large part of  
10 their goal already by parading this in the public eye by having  
11 all of our clients, potential investors and business partners  
12 say, well, gee, how do I know this isn't going to go on forever  
13 and cost a lot of money and drag me into it. Nobody wants to  
14 get dragged into a situation like that and that's why we have  
15 to resolve it quickly and efficiently.

16 Thank you for hearing me out, your Honor. Unless you  
17 have any questions, I'll sit down

18 THE COURT: All right. Thank you.

19 The complaint in this action was filed on March 14,  
20 2018. It brings claims under the defense Defend Trade Secrets  
21 Act, as well as very common law theories including  
22 misappropriation of trade secrets, unfair competition, tortious  
23 interfere with contracts and other common law claims against  
24 Hippo Technology LLC, a limited liability company under the  
25 laws of Delaware.

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1           Shortly after the complaint was filed on April 6, 2018  
2 Hippo Technologies LLC filed a motion seeking to compel  
3 arbitration of all claims in the complaint brought by plaintiff  
4 Blink. That was the first requested relief. Second, staying  
5 this case pending the outcome of a related Triple A arbitration  
6 brought by Hippo, Jacobi and Kakaulin against Blink and  
7 granting such other and further relief as the Court deems just  
8 and proper.

9           At argument today counsel made it plain, counsel for  
10 Hippo, made it plain that it is withdrawing the motion insofar  
11 as it seeks to compel arbitration of all claims in the  
12 complaint brought by plaintiff Blink Health Limited. So what  
13 remains is the question of a stay.

14           Hippo was founded by Charles Jacobi and Eugene  
15 Kakaulin, who are previously executives at Blink. Jacobi  
16 served as Blink general counsel and Kakaulin as Blink's vice  
17 president and chief financial officer.

18           There was a non disclosure agreement that was signed  
19 by the parties, by Jacobi and Kakaulin and Blink during the  
20 period of Jacobi and Kakaulin's employment. There was for  
21 reasons that are somewhat extraneous, separate agreements  
22 entered into by Jacobi and Kakaulin in or about the time that  
23 they -- at least in the case of Jacobi -- in or about the time  
24 he left the employment of Blink. His agreement is dated  
25 February 5, 2017.



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1           And in the agreement Mr. Jacobi re-affirmed and  
2           acknowledged that he remains bound by the provisions of the non  
3           disclosure agreement and further affirms and acknowledges that  
4           the provisions of the NDA shall remain binding upon him with  
5           certain modifications that are set forth.

6           Thereafter, the agreement contains an arbitration  
7           provision which provides at paragraph 15 any dispute regarding  
8           this agreement cannot be resolved by negotiations between  
9           employee and the company shall be submitted to and solely  
10          determined by binding arbitration conducted by the employment  
11          rules of the Triple A, and the parties agreeing to be bound.  
12          Mr. Jacobi's agreement says all questions regarding whether or  
13          not a dispute is subject to arbitration will be resolved by the  
14          arbitrator.

15          I have not quoted the full text of the arbitration in  
16          this bench ruling.

17          With regard to Mr. Kakaulins who was as noted also a  
18          signatory of NDAs, his agreement with the company was dated  
19          January 31, 2017 and it's styled as a settlement agreement and  
20          mutual release.

21          It too contained a provision re-affirming the  
22          enforceability of the confidentiality, assignment of  
23          inventions, non competition and non solicitation agreement that  
24          had been signed by him on August 11, 2015. And in fact it  
25          says:

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1 Except as may be otherwise modified in this agreement  
2 Kakaulin agrees that he shall remain bound in all respects by  
3 all of the obligations set forth in paragraphs one, four and  
4 five of the referenced agreement.

5 This agreement provides that any dispute or  
6 controversy arising out of or relating to this agreement,  
7 including any claims under statute law or regulation between  
8 Kakaulin on the one hand and the Blink parties or any of their  
9 respective officers, directors or employees on the other hand,  
10 shall be resolved exclusively by arbitration.

11 Again, I'm not reading the agreement in full.

12 And there is an arbitration proceeding pending before  
13 the Triple A at the moment. The Court has to reviewed the  
14 claimant's statements of claims which were submitted under  
15 cover of letter dated April 30, 2018. It suffices to know that  
16 it seeks damages for breach of Jacobi's agreement with the  
17 government and same as to Kakaulin, indemnification and there  
18 is as noted abuse of process claim and tortious interference  
19 claim and the sixth claim for relief is declaratory judgment  
20 that claimants neither took nor ever used Blink's alleged trade  
21 secrets or other confidential information.

22 As counsel for Blink has pointed out, the issues in  
23 the action before me are not identical to the issues in the  
24 pending arbitration. But as he has asserted that there may be  
25 inefficiencies in both the arbitration and the lawsuit going

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1 forward. He's expressed the view that this district court  
2 action is the preferred forum because arbitration will be  
3 permissible and that all issues in the arbitration essentially  
4 will be resolved by a resolution of this lawsuit. As he put it  
5 there won't be anything left to arbitrate. He notes that there  
6 is an overlap of fact and an overlap of issues but not all  
7 issues will be resolved in the arbitration if the arbitration  
8 proceeds and this action is stayed.

9 In this circuit the question of a stay under the  
10 court's inherent powers and control of its docket is well  
11 established.

12 And you can look at the Sierra Rupile v. Patts  
13 decision by the Circuit. The law goes back pretty much long  
14 before that, back to a 1960 case decided by the Circuit.

15 And one of the things that a Court looks at is whether  
16 there are issues common to the arbitration and the Court  
17 proceeding and here there clearly are. Jacoby and Kakaulin are  
18 central to the claims that are pending before me and central to  
19 the claims that are brought in the arbitration and is their  
20 taking or not taking trade secrets, whether there are trade  
21 secrets to be taken in the first place, these are issues raised  
22 in both the action before me and the arbitration.

23 And while one doesn't know what would happen if the  
24 action before me proceeded to judgment or whether the  
25 arbitration proceeded to an award, I would say that there is a

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1 strong prospect that issues in the case cause before would be  
2 finally determined by the arbitration, including whether there  
3 were trade secrets in the first place and whether Jacobi and  
4 Kakaulin breached the NDA. That should be resolved in the  
5 arbitration in the first instance.

6 There is no indication before me that this arbitration  
7 cannot be resolved in a reasonable period of time. And one of  
8 the other points I wanted to make is the overlap between Defend  
9 Trade Secrets Act claim and those that are brought either by  
10 way of contract or by common law.

11 The parties should take a look at Free Country Limited  
12 v. Drennen 235 F.Supp 3d 559 cited in 2016 by one of my  
13 colleagues, that both -- Well, as it was put the  
14 Misappropriation of Trade Secrets claim requires a plaintiff to  
15 show that defendants used that trade secret in breach of  
16 agreement, confidential relationship or duty or as a result of  
17 discovery by improper means.

18 That is to make out the common law claims and that the  
19 show of violation of the defendant Trade Secret Act, the  
20 plaintiff must establish the use of a trade secret by one who  
21 used improper means to acquire the secret or at the time of  
22 disclosure knew or had reason to know that trade secret was  
23 acquired under improper means under circumstances giving rise  
24 to a duty to maintain the secrecy of the trade secret or  
25 derived from what -- a person who owed such a duty. So it

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1 seems to me that overlap is very strong.

2 Now, to protect Blink I'm not granting a stay in this  
3 case pending the completion of arbitration. I'm granting a  
4 stay only until September 30, 2018 and I'm going to require a  
5 report by October 15, 2018 as to the status of the arbitration  
6 as of September 30, 2018. So the stay technically will run  
7 till my decision pending the receipt of the report on  
8 October 15. The parties are free at that point to move to  
9 vacate the stay or move to continue the stay at that point.  
10 And I'll see where things are in the arbitration.

11 Is there anything further from the plaintiff?

12 MR. SNYDER: No, your Honor. Thank you very much.

13 THE COURT: Anything further from the defendant?

14 MR. KAYMAN: No. Thank you very much, your Honor.

15 THE COURT: All right. Thank you all very much.

16 MR. SNYDER: Your Honor, may I approach?

17 THE COURT: Sure.

18 MR. KAYMAN: You want me there?

19 THE COURT: Yes. Come on up.

20 Off the record.

21 (Adjourned)